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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1454

JACK O. PEARSON,
Appellant,

VERSUS

STATE OF OKLAHOMA,
Appellee.

ON APPEAL FROM THE OKLAHOMA COURT OF CRIMINAL APPEALS

JURISDICTIONAL STATEMENT

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No. _____

JACK O. PEARSON,
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VERSUS

STATE OF OKLAHOMA,
Appellee.

ON APPEAL FROM THE OKLAHOMA COURT OF CRIMINAL APPEALS

JURISDICTIONAL STATEMENT

STATEMENT

Appellant, Jack O. Pearson, appeals from the judgment of the Oklahoma Court of Criminal Appeals, entered on December 20, 1976 (Appendix A, infra), affirming the judgment of the District Court of Oklahoma County, Oklahoma, finding him guilty of a violation of 21 Okl. Stat. 1971, § 421 et seq., conspiracy to commit murder, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal, and that a substantial federal question is presented. Should jurisdiction not lie, we respectfully request that these papers be treated in accordance with the provisions of 28 U.S.C. § 2103.

OPINIONS BELOW

The two opinions filed in the Oklahoma Court of Criminal Appeals are reproduced below. The first opinion was filed on February 5, 1976 (Appendix B). That opinion was withdrawn and a second opinion substituted on November 23, 1976 (Appendix A). The first opinion is reported at 47 Oklahoma Bar Association Journal 410. The second opinion of the court is reported at 556 P.2d 1025 (Okl. Cr. 1976).

JURISDICTION

This criminal action was initiated by the State of Oklahoma in the District Court of Oklahoma County, accusing Jack O. Pearson of violating 21 Okl. Stat. 1971, § 421, i.e., conspiracy to commit murder. A jury returned a verdict of guilty, which was affirmed by the judgment of the Oklahoma Court of Criminal Appeals, the State's highest criminal court, entered on February 5, 1976, opinion withdrawn and new opinion substituted on November 23, 1976. A petition for rehearing was denied and the mandate or decree issued on December 20, 1976 (Appendix D). Notice of appeal was filed on March 7, 1977 (Appendix C, infra). The jurisdiction of this Court rests upon 28 U.S.C. § 1257(2), in that the court below in determining the issue expressly held that 21 Okl. Stat. 1971, § 1757 was consistent with 18 U.S.C. § 2511(2)(d), and by implication consistent with the United States Constitution. We respectfully submit that jurisdiction lies because 21 Okl. Stat. 1971, § 421 and § 1757 as construed and applied by the court below violates the Fourth and Fourteenth Amendments to the Constitution of the United States.

STATUTES INVOLVED

21 Okl. Stat. 1971, § 1757:

> "Any person who maliciously, or without legal authority removes, injures, or obstructs any line of telephone or telegraph, or any part thereof, or appurtenances or apparatus therewith connected, or severs any wires thereof, or fraudulently or without legal authority, intercepts any message, communication or conversation in its passage over such wires, or who fraudulently or without legal authority connects any telephone or telegraph line or wire, any instrument or other apparatus capable of being used in intercepting messages, communication or conversations, is guilty of a misdemeanor and upon conviction shall be punished by a fine of not less than $50.00, nor more than $500.00, or imprisonment in the county jail not exceeding one year, or by both such fine and imprisonment."

21 Okl. Stat. 1971, § 1782:

> "Any person who shall disclose the contents of any telegraphic dispatch or telephone message or communication, or any part thereof, addressed to or which he knows to be intended for another person without the permission of such person, except upon the lawful order of a court, or judge thereof, with intent to cause injury, damage or disgrace to such other person, or which does in fact cause injury, damage or disgrace to such other person, shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not less than $50.00, nor more than $500.00, or by imprisonment in the county jail not less than thirty days or more than one year, or by both such imprisonment and fine. Provided, that nothing herein shall apply to public officers in the discharge of their duties."

21 Okl. Stat. 1971, § 421:

"If two or more persons conspire, either: (1) to commit any crime; . . .

"Except in cases where a different punishment is prescribed by law, the punishment for conspiracy shall be a misdemeanor unless the conspiracy be to commit a felony.

"Conspiracy to commit a felony shall be a felony and is punishable by a fine not exceeding $1,000.00 or by imprisonment in the state penitentiary not exceeding two (2) years, or by both such fine and imprisonment."

18 U.S.C. § 2511(2):

"(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

"(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any state or for the purpose of committing any other injurious act."

Amendment Four to the Constitution of the United States of America:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no

Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment Fourteen to the Constitution of the United States of America:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

1. Whether 21 Okl. Stat. 1971, § 1757 as construed by the Oklahoma Court of Criminal Appeals and as applied to this case is in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States.

2. Whether 21 Okl. Stat. 1971, § 1757 which prohibits consensual interception and recording of telephone conversations as evidence in court, *Cameron* v. *State*, 365 P.2d 576 (1961), is consistent with 18 U.S.C. § 2511(2)(d) which expressly permits such consensual recording as evidence.

3. Does 18 U.S.C. § 2511(2)(d) preempt state legislation in the field of consensual interception and recording of telephone conversations by police officers secured without prior judicial authorization?

4. Is the Fourth Amendment prohibition, made applicable to the states through the Fourteenth Amendment, against unreasonable searches and seizures violated by allowing the introduction of tapes of telephone conversations made with the consent of one of the participants, who called the Appellant at the request of police officers, as independent evidence in the prosecution's case-in-chief over the expressed Fourth Amendment objections of the Defendant?

5. Is 18 U.S.C. § 2511(2)(d), which answers question four in the negative, violative of the Fourth and Fourteenth Amendments to the Constitution of the United States?

6. Is 21 Okl. Stat. 1971, § 421 as construed and applied by the court below repugnant to the Fourteenth Amendment of the United States Constitution?

STATEMENT OF THE CASE

1. Defendant was charged along with his wife, Linda, and one George Kriz with conspiracy to commit murder in the first degree. Defendant was alleged to have solicited George Kriz to find someone for him to do a "job." Kriz reported the conversation to one Don Woodyard who led Kriz to believe that he was interested. Kriz brought the matter to the police who then interrogated Woodyard. At the suggestion of Detective Jack Hill, Don Woodyard called Defendant at home on the telephone while Hill made a recording of the conversation. Hill participated in the conversation and was introduced to Appellant over the telephone by Woodyard as "Rocco" who could get the "job" done. Kriz was granted immunity at the trial. The Court

of Criminal Appeals found, however, that neither Kriz nor Woodyard had any intent or agreement with the Defendant to commit a crime and therefore were not co-conspirators. *Pearson*, supra 1031.

2. After the conclusion of the preliminary hearing, the charge against Linda Pearson was dismissed by the district court for insufficient evidence. Notwithstanding the dismissal for insufficient evidence, the Court of Criminal Appeals found that she was a co-conspirator. *Pearson*, supra 1031. No other conspirators were named or unnamed. Thus, although three persons were charged with conspiracy, one was dismissed for insufficient evidence, the Court of Criminal Appeals found no agreement on the part of the second, and only Appellant was convicted.

A. How the Federal Issues Were Presented

At the trial, the State introduced as part of its case-in-chief the aforementioned tape recording of the telephone conversation among Defendant, Don Woodyard and Detective Jack Hill. The exhibit was objected to by Defendant's counsel on several grounds including that there was no judicial authorization for the interception or recording (Tr. 57),[1] that this was an invasion of the privacy of Appellant (Tr. 57), that it was a violation of the Fourth and Fourteenth Amendments of the Constitution (Tr. 57), and that its introduction "would be in violation of the constitutional rights of this Defendant" (Tr. 38). The objections were overruled in all respects and side two of exhibit three was

[1] Tr. refers to trial transcript, a copy of which has been certified to this Court.

admitted into evidence and played for the jury. Thus, the federal question was raised and overruled at the earliest possible moment in the trial court. The objections were preserved in the Motion for New Trial and raised on appeal in the Petition-in-Error. Even if the federal question had not been timely raised and renewed (which it was) the decision below speaks directly and unequivocally to the federal question. *Cf. Saltlonstall* v. *Saltlonstall,* 276 U.S. 260, 267-8 (1928); and *Charleston Federal Savings and Loan Association* v. *Alderson,* 324 U.S. 182, 185-6 (1945), *Manhattan Life Insurance Company* v. *Cohen,* 234 U.S. 123, 134 (1914).

Following Defendant's conviction, he was sentenced to two years in prison which he is presently serving. His conviction was appealed to the Oklahoma Court of Criminal Appeals, the state court of last resort in criminal matters. On February 5, 1976, the court issued its first opinion (Appendix B) affirming the conviction and holding that the introduction of the taped conversations was error but harmless error. A Petition for Rehearing was filed challenging the holding of the decision. On November 23, 1976, the court withdrew its earlier opinion and this time held inter alia, George Kriz and Don Woodyard were not co-conspirators, but Linda Pearson was a co-conspirator, the admission of the recordings was permissible because 21 Okl. Stat. 1971, § 1757 did not prohibit its introduction and the statute is consistent, as interpreted, with the provisions of 18 U.S.C. § 2511(2)(d) and therefore implicitly not unconstitutional. On its face and as applied before, the state statute clearly prevented the introduction of the recordings. *Cameron* v. *State,* Okl. Cr., 365 P.2d 576 (1961). Relying upon decisions of this Court (infra) and 18 U.S.C. § 2511(2)(d) the court

below found the statute, as applied, consistent with 18 U.S.C. § 2511(2)(d) and not violative of the Fourth and Fourteenth Amendments. A Petition for Rehearing was filed as was a Motion to Stay Issuance of the Mandate on the grounds that 21 Okl. Stat. 1971, § 1757 was in conflict with 18 U.S.C. § 2511(2)(d). The petition and motion were denied, the judgment was entered on December 20, 1976, and the mandate issued the same day.

B. The Decision Rests on a Federal Ground

As we make clear, the decision below is based on a federal ground. The Oklahoma Court of Criminal Appeals had previously held that 21 Okl. Stat. 1971, § 1757 precluded consensual and participant eavesdropping. *Cameron* v. *State,* supra. In the instant case, the court ruled "for reasons which are to become apparent, we no longer adhere to the holding in the Cameron decision," citing *Rathbun* v. *United States,* 355 U.S. 107 (1957), *Lopez* v. *United States,* 373 U.S. 427 (1963) and *Hoffa* v. *United States,* 385 U.S. 293 (1966), all Supreme Court decisions involving interpretations of either federal statutes or the Fourth Amendment. The immediate following paragraph of the opinion below states "taken together, these cases establish the principle that one who voluntarily enters into a conversation with another takes the risk that such person may memorize, record or even transmit the conversation." Thus, the validity of the introduction of the tapes was established by the court below on authority of three United States Supreme Court decisions which are based upon interpretations of the Fourth Amendment of the Constitution of the United States and a federal statute.

The next paragraph of the opinion below claims that the state wire-tap law, which it had just emasculated by reference to this Court's holding in the three cases above, ". . . however, must be read in conjunction with the applicable federal law. We must now determine whether such a tape recording is in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 . . . although we feel that the act has not preempted the field of electronic surveillance, it has at the very least set minimal standards with which all states must comply." *Pearson*, supra, at 1034. The court then found the statutes consistent though obviously they are completely inconsistent by a plain reading of the text.

The "validity" of a state statute is sustained, for purposes of an appeal to this Court under 28 U.S.C. § 1257(2) when the state court holds the statute to be consistent with the Constitution, treaties or laws of the United States. *La Crosse Telephone Corporation* v. *Wisconsin Board*, 336 U.S. 18 (1949); *Bethlehem Steel Company* v. *New York Board*, 330 U.S. 767 (1947); *Guss* v. *Utah Labor Board*, 353 U.S. 1, 5-6 (1957). The fact that the court below thought it necessary to construe a federal statute indicates that the construction of such act was material to the court's ultimate holding. *Illinois Central Railroad Company* v. *Messina*, 240 U.S. 395 (1916); *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95 (1938).

ARGUMENT

THE QUESTIONS ARE SUBSTANTIAL

A. Electronic Eavesdropping

A majority of this Court has never held that the Fourth Amendment permits police-directed surreptitious monitoring of telephone conversations with the consent of a participant in the conversation. See *Bakes* v. *United States*, 350 F.Supp. 547 (D.C. Ill. 1972), aff'd 478 F.2d 1405. Nor has this Court ruled on the constitutionality of Title III of the Omnibus Crime and Safe Streets Act of 1968. See *United States* v. *Cox*, 406 U.S. 934 (1972), or more particularly the validity, in view of the Fourth Amendment, of Title 18 U.S.C. § 2511(2)(c) and (d). See *United States* v. *White*, 401 U.S. 745 at 792 fn 30 (1971) (Mr. Justice Harlan dissenting).

The issues presented here are substantial because, with respect to such consensual monitoring, on which this Court is divided, four to four, *White*, supra, "the incidence of the practice is rather high." Greenwalt, "The Consent Problem in Wiretapping and Eavesdropping: Surreptitious Monitoring with the Consent of a Participant in a Conversation." 63 Col. L. Rev. 190. Such monitoring by the police is done "tens of thousands of times each year." A. Westin, *Privacy and Freedom*, at 127 (1967).

The questions presented by this appeal were not answered definitively in *United States* v. *White*, supra, although four members of this Court then sitting felt, under the circumstances of that case, that participant consensual eavesdropping was permissible. However, the plurality opinion went beyond the essential issue in the

case which was the retroactivity of this Court's holding in *Katz* v. *United States*, 389 U.S. 347 (1967). *On Lee, Rathbun, Lopez, Hoffa, White* and *Osborn*, are all inapposite to the instant situation, although all are relevant to evaluation and determination of the question.

1. In *Osborn* v. *United States*, 385 U.S. 323 (1966), a tape recorded face to face encounter was introduced into evidence and upheld by this Court because of the precise particularities surrounding the surveillance procedures. *Osborn*, supra, at 330-331. The recording moreover, was authorized by a federal judge after presentation to him of the initial facts justifying the investigation.

2. *On Lee* v. *United States*, 343 U.S. 747 (1952), involved a subject whose conversations in person were transmitted electronically to law enforcement agencies off the premises of his business. The holding was justified on the basis of *Olmstead* v. *United States*, 277 U.S. 438 (1928), and *Goldman* v. *United States*, 316 U.S. 129 (1940). Neither decision is now valid. See *Silverman* v. *United States*, 365 U.S. 505 (1961), and *Katz*, supra.

3. *Lopez* v. *United States*, 373 U.S. 427 (1963), involved the evidentiary use of a tape recording of a face to face meeting by defendant made by an Internal Revenue Agent whom the defendant was trying to bribe. The Court upheld the introduction of the tape recording into evidence. Neither a telephone nor an electronic transmitter was involved.

4. *Hoffa* v. *United States*, 385 U.S. 293 (1966), involved the use of secret agents and electronic eavesdropping was not an issue.

5. In *United States* v. *White*, 401 U.S. 745 (1971), the facts revealed White was engaged in illegal narcotics transactions and his conversations with the informer were monitored by a radio transmitter concealed on the informer. *White* is a plurality opinion on all issues except the holding that *Katz* was not retroactive. *White* rests on *pre-Katz* law.

6. *Rathbun* v. *United States*, 355 U.S. 107 (1957), is not controlling for two reasons. First, no recordings were made and, secondly, the order granting the petition for certiorari restricted the court's consideration to a question of statutory instruction. 352 U.S. 965.

This case involves monitoring and police recording of a telephone conversation among Appellant and an informer, Don Woodyard, and one "Rocco," at the suggestion of Detective Hill. "Rocco" was introduced by Woodyard as a "hit man" but who was in reality Jack Hill, a detective on the Midwest City Police Department. The recordings were introduced by the prosecution in its case-in-chief at the trial below as independent evidence. The recordings were not introduced as corroboration but as an event of the criminal acts. See *United States* v. *Schanerman*, 150 F.2d 941 (3rd Cir. 1958); *Gillans* v. *United States*, 182 F.2d 962 (D.C. Cir. 1950); *Monroe* v. *United States*, 234 F.2d 49 at 55 (D.C. Cir. 1956).

At the threshold we believe that "the procedure of antecedent justification before a magistrate . . . is central to the Fourth Amendment." *Ohio ex rel. Eaton* v. *Price*, 364 U.S. 263, 272 (1960), (separate opinion); *McDonald* v. *United States*, 335 U.S. 451, 455-6 (1948). The fact that the issue presented here is in the context of a criminal case

should not blind us to the reality that the fundamental right at stake is the right of all of us to be free from unjustified government encroachment upon our privacy by weakening the guarantees of the Fourth Amendment. "The safeguards of liberty have frequently been forged in controversies involving not very nice people." *United States* v. *Rabinowitz*, 339 U.S. 56, 69 (1950) (Mr. Justice Frankfurter dissenting), and "the guilty are almost always the first to suffer those hardships which are afterwards used as precedents against the innocent." *United States* v. *Barnett*, 505 F.2d 1091 at 1114-15 (7th Cir. 1975, dissenting Judge, now Mr. Justice Stevens).

In a case such as this, few would object to a police-sponsored telephone call which is then police-monitored in order to apprehend a criminal making a highly incriminating statement. Yet, it is not just Appellant's rights which are threatened. The decision below and the statutes relied upon violate the Fourth Amendment because they permit, indeed encourage, the police to use dupes, informers, and spies to monitor many innocent or non-criminal conversations in order to catch a criminal or to use a criminal investigation as a pretext for such monitoring.

The "right to privacy" is a basic constitutional right recognized by the Fourth Amendment. *Mapp* v. *Ohio*, 367 U.S. 643, 656 (1961). The holding of *Boyd* v. *United States*, 116 U.S. 616 (1886), is that the Fourth and Fifth Amendments interact to create a comprehensive right of privacy, of individual freedom that has repeatedly been acknowledged by this Court. See *Bram* v. *United States*, 168 U.S. 532, 544 (1897); *Weeks* v. *United States*, 232 U.S. 383 (1914).

Privacy and the integrity of the personality have been recognized by this Court in numerous settings. *Roe* v. *Wade*, 410 U.S. 113 (1973); *Griswold* v. *Connecticut*, 381 U.S. 479 (1965); *Louisiana* v. *N.A.A.C.P.*, 366 U.S. 293 (1961); *Shelton* v. *Tucker*, 364 U.S. 479 (1960); *Watkins* v. *United States*, 354 U.S. 178 (1957); *Stanley* v. *Georgia*, 394 U.S. 557 (1969). In considering investigations that impinge on privacy for alleged violations of the criminal law, typically this Court has required that for the invasion of privacy to be constitutionally permitted, it must be subject to the warrant requirement. *Camara* v. *Municipal Court*, 387 U.S. 523 (1963); *Terry* v. *Ohio*, 392 U.S. 1 (1968); *Chimel* v. *California*, 395 U.S. 752 (1969); *Mapp* v. *Ohio*, supra, absent some exigent circumstances which clearly are not applicable here. Nor are police neutral and detached for the purpose of determining whether the degree of probable cause is sufficient to invade that privacy. *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971). There are no exigent circumstances in consensual monitoring and recording that require a waiver of the warrant. *Cf. Chambers* v. *Maroney*, 399 U.S. 42 (1970); *Chimel* v. *California*, supra; *Terry* v. *Ohio*, supra; *Harris* v. *United States*, 390 U.S. 234 (1971) and 18 U.S.C. § 2518(7). Indeed, the very facts which would arouse police suspicion sufficiently for them to persuade one of the participants to allow the monitoring would almost inevitably be sufficient to establish probable cause for a warrant or order authorizing the eavesdropping. Unique, then, of the exclusionary rule cases, the warrant requirement here protects the innocent and not the criminal. For if there is probable cause to believe a person is guilty of a crime or that he is planning a crime and that

evidence of that crime may be obtained by intercepting certain conversations, then there should be little trouble in securing a warrant to apprehend the guilty. If the conversation is, however, innocent, then the necessary supporting facts for the affidavit will be insufficient and the warrant will not issue and privacy will not be breached. Yet, not to require a warrant exposes many innocent, intimate and non-criminal conversations to the possibility of continual interception and monitoring with the only restraint upon the police being self-restraint and the necessity of locating a willing party to the conversation to permit the monitoring. Such obstacles are hardly difficult to overcome. The possibility of such a dragnet is incompatible with a free society and will inhibit free and serious intercourse by telephone whether social, business or professional. Thus, conversations between husband and wife, parent and child, employer and employee, lovers, lawyer and client, psychiatrist or physician and patient, and priest and parishioner will all be subject to possible eavesdropping.

The healthy discharge of frustrations and hostilities through conversation has been recognized by various members of this Court, *United States* v. *White*, supra, at 763 (Mr. Justice Douglas dissenting), id. *White*, at 788 (Mr. Justice Harlan dissenting), as dependent upon the fact that individuals believe they will not be held strictly accountable for what they say or do in private. It is imperative in any scheme of ordered liberty that the individual members of society be constitutionally assured that the government will respect their privacy. Through this autonomy and protection a person maintains his personal integrity by keeping inviolate his ultimate secrets.

"Within the intimacy of small groups and close relationships an individual is able to overcome the isolation of the human condition. Private conversations, which are often characterized by 'exaggeration, obscenity, agreeable falsehood, and expressions of antisocial desires not seriously meant' also provide a form of social relief . . . For the essence of intimacy is the sharing of emotions and information not revealed to the public or more casual acquaintances. The extent to which an individual controls or discloses personal information delineates the degree and the nature of his interaction with other members of society. Some respect for this control is therefore indispensible to a healthy society." Note, "The Applicability of the 'New' Fourth Amendment to Investigations by Secret Agents: a Proposed Delineation of the Emerging Fourth Amendment Right to Privacy," 45 Wash. L. Rev. 785, 792-93 (1970) (citations omitted).

Privacy cannot exist at the whim or sufferance of law enforcement personnel. So long as incriminating statements made by criminals can be testified to, the added contribution to law enforcement made by monitoring sanctioned by a warrant or order outweighs the added invasion of privacy—if the statements monitored are in fact proof of crime. On the other hand, if statements of innocent people are monitored—as will be done under the federal law now in existence—they will be spread more widely than the speaker's wish with no compensating social gain. In some situations they may even be used by officers for private gain. Plainly, it makes sense to narrow the situations in which monitoring takes place to those in which law enforcement gain is likely to be great. The familiar constitutional law technique for accomplishing this is the probable cause requirement within the context of the court-ordered system.

"It seems doubtful that law enforcement interests would greatly suffer from the imposition of a probable cause standard in this area. Frequently, if A will incriminate himself before B one time, he will be willing to do so again." *Greenwalt*, supra, at 229.

Absent the warrant requirement the specter of electronic eavesdropping could easily have a profound effect on the discourse of those people formerly willing to assume the risk that their listeners might betray their confidential communications. If individuals can no longer determine when they are speaking "off the record," they may lose their sense of personal security, a fragile composite of many irrational psychological factors. If this informality is destroyed, an important release mechanism for relieving social tensions will cease to function. See generally *Westin*, supra, at 32-42.

Privacy aside, it has been argued that a person who speaks with another takes the risk that his words will be repeated so therefore electronically recording a conversation is consistent with this assumption of the risk—all the more so for the criminal. Alternatively, it has been said that either party to a conversation may waive its privacy. The rebuttal to such an argument, however, is that the individual clearly has an expectation of privacy in his telephone conversation. Human experience tells us that when we speak to another in private over the telephone our expectation is that we are heard by his ears and his alone. Few of us anticipate betrayal by those with whom we speak via the phone. Certainly, we realize that those to whom we speak may repeat our conversation. However, "much offhand exchange is easily forgotten and one may

count on the obscurity of his remarks, protected by the very fact of a limited audience and the likelihood that the listener will either overlook or forget what is said." *White*, supra, at 788. This widely held assumption is defeated by warrantless recording.

The concept of waiver of an individual's right has been strictly interpreted by this Court and generally will not be presumed from silence. *Boykin* v. *Alabama*, 395 U.S. 238, 242 (1969); *Carnley* v. *Cochran*, 369 U.S. 506, 516 (1962). To even speak of a waiver or consent is totally inconsistent with the internal logic of consensual eavesdropping, for this Court has recognized that ". . . of course, the very nature of electronic surveillance precludes its use pursuant to the suspect's consent." *Katz*, supra, at 358. Certainly Appellant intended privacy and this was so recognized by the police detective or else they would not have gone to the lengths they did to tape the conversation. To imply or find a constructive waiver or consent indirectly when it would never have been given directly, is incredulous. Appellant certainly did not surrender his right of privacy when he communicated his thoughts to Woodyard. If a person commits his secret thoughts to paper, there is no license for the police to seize the paper without probable cause and an antecedent determination by a neutral magistrate. If a person communicates his secret thoughts verbally to another there is no license for the police to record the words. *Silverman*, supra. Nor can it be seriously argued there was a waiver. For "the right of privacy would mean little if it were limited to a person's solitary thought and so fostered secretiveness . . . 'the common law secures each individual the right of determining, ordinarily, to what extent his

thoughts, sentiments, and emotions shall be communicated to others . . . and even if he has chosen to give them expression, generally retains the power to fix the limits of publicity which shall be given them.' Warren and Brandeis, 'The Right to Privacy,' 4 Har. L. Rev. 193 at 198 (1890)." *Lopez* at 450 (Mr. Justice Brennan dissenting). Certainly, Woodyard cannot waive Pearson's Fourth Amendment rights any more than a hotel manager can consent to a search of a guest's room, *Stoner* v. *California*, 376 U.S. 483 (1964); *United States* v. *Jeffers*, 342 U.S. 48 (1951); or a landlord give permission attributable to its tenant to search the tenant's quarters, *Chapman* v. *United States*, 365 U.S. 610 (1961); and the majority of this Court has never relied on the so-called assumption of the risk doctrine to validate intercepted private communication. *Holmes* v. *Burr*, 486 F.2d 55 at 71 (9th Cir. 1973) (Judge Hufstedler dissenting).

To argue "that a person 'assumes the risk' of electronic surveillance, although he was rightfully oblivious to the risk, is to mislabel a newly created rule of law limiting the scope of the Fourth Amendment." *Holmes*, supra, at 72 (Judge Hufstedler dissenting). Arguably, an individual expects that anything he tells a second or third party may be repeated in a court of law absent some privilege, but there is a difference between that and talking to a person using electronic equipment to monitor and record a conversation. All of us discuss topics and use expressions with one person that we would not undertake with another and we would never broadcast to a crowd. No one talks to a recorder as he talks to a person. Moreover, the person who knows that the conversation is recorded can frame the tone of his voice and his questions to elicit from the other person answers

that he desires and thus give a distorted quality to the reliability of the recording.

It has been argued further that a person contemplating illegal activity assumes some risk that others do not. Among these risks, it is said, is subjugation to warrantless electronic monitoring. *White*, supra at 752. The difficulty, however, with this argument is that absent the Fourth Amendment requirement, of antecedent justification before a neutral judge or magistrate, the innocent cannot be separated from the guilty without probing everyone's conversation or leaving the selection to the unbridled discretion of government agents. What is left of anyone's justifiable reliance on privacy (see *Katz*, supra at 353) if everyone must realize he will be free from warrantless electronic intrusion only so long as someone in the government does not suspect him of improper conduct or wrongful thinking? To ask the question is to answer it. The guardian of the individual's right to privacy in this country is a neutral magistrate, not police self-discipline or the willingness of an informer or dupe to tape record a conversation. We should never allow electronic surveillance based on rationale which requires an assumption of guilt, for the assumption of guilt is clearly contrary to the constitutionally mandated presumption of innocence. Cf. *In re Winship*, 397 U.S. 358 (1970).

The plain meaning of the Oklahoma Wiretap Law, supra, is that participant-recorded conversations may not be introduced as evidence in court, *Cameron*, supra. The court below repeals this express language by reliance on a federal statute which does not preempt the field, as the

court noted, *Pearson*, supra, 1034. See also, *People* v. *Conklin*, 522 P.2d 1049, 1050, et seq. (Calif. 1974), for a similar conclusion. The court's reasoning is *non sequitur*. Permissive federal legislation which does not preempt the field does not, by implication, repeal a state statute expressly forbidding what the federal statute permits.

Although on its face the statutes do not violate the Fourth Amendment and are clearly inconsistent with the federal statute, the Oklahoma Court has by construction and application made them consistent with the federal statute, and by implication with the Fourth Amendment to the United States Constitution. In so doing, the court below is in error as it relies upon decisions of this Court clearly not controlling and distinguishable. Participant monitoring and recording of telephone conversations and subsequent introduction of these tapes into evidence violates the Fourth and Fourteenth Amendments. For that reason the judgment below must be reversed.

B. One-Man Conspiracy

During the trial by demurrer to the evidence, after conviction by motion for new trial, and on appeal by assignment of error, the Appellant urged that the proof against him failed because the State had not proven a conspiracy in that there was no testimony that the Appellant conspired with anyone to commit murder. Appellant was originally charged wtih George Kriz and his wife, Linda Rae Pearson. George Kriz was dismissed at the preliminary hearing stage and subsequently granted immunity by the trial court. Notwithstanding this grant of immunity, however, the Oklahoma Court of Criminal Appeals specifically found that neither George Kriz nor Don Woodyard were co-conspirators, regardless of any immunity grant because neither ever had an agreement with Appellant to commit murder. *Pearson*, supra, at 1031. The only other possible co-conspirator would be Linda Rae Pearson. However, the charges against Linda Pearson were dismissed following preliminary hearing for insufficient evidence. The Court of Criminal Appeals attempted to circumvent this fact by holding that Linda Rae Pearson was a co-conspirator in any event. *Pearson*, supra, 1031. Such determination by the Oklahoma Court is a violation of the Defendant's Fourteenth Amendment rights to equal protection of the law and due process. An individual charged with the crime of conspiracy and against whom the charges are dismissed for insufficient evidence cannot later be held to be a co-conspirator for the purpose of affirming a conviction against the remaining conspirator.

This Court has recognized that "one person obviously cannot conspire with himself. *Morrison* v. *California*, 291 U.S. 82 (1934); *Feder* v. *United States*, 257 Fed. 694 (2nd Cir.)." *United States* v. *Williams*, 341 U.S. 58, 86 (1951) (Mr. Justice Black concurring). *Williams* also holds that the acquittal of all co-conspirators means the principal must also be acquitted.

In *Morrison* v. *California*, supra, a conviction for conspiracy was reversed because the charge against the co-conspirator failed because of his lack of guilty knowledge. Where two are charged with criminal conspiracy and the conviction of one is reversed because of insufficiency of the evidence to support it, the conviction of the other defend-

ant must be reversed. *Gebardi* v. *United States,* 287 U.S. 112 (1932). This is likewise true when the charges against the other person are dismissed for insufficient evidence. *Hartzel* v. *United States,* 322 U.S. 60, fn 3 (1944); *Thompson* v. *United States,* 227 F.2d 671 (5th Cir. 1955); *United States* v. *Postma,* 242 F.2d 488, cert. den'd 354 U.S. 922 (2nd Cir. 1957).

Indeed, mere knowledge, acquiescence or approval without cooperation or an agreement is not enough to constitute one a party to a conspiracy. *McDaniel* v. *United States,* 24 F.2d 303 (5th Cir. 1928); *United States* v. *Mendez,* 496 F.2d 128, 130 (5th Cir. 1974). Likewise, "mere association with conspirators is not enough to establish participation in a conspiracy." *Roberts* v. *United States,* 416 F.2d 1216 (5th Cir. 1969). Accord, *United States* v. *Mendez,* supra. With respect to Linda Pearson and the evidence below, "there was no showing of active participation on her part, nor did the evidence tend to show concerted action for the accomplishment of a common purpose. The evidence at most shows her association with (her husband) Mendez and knowledge of his activities. It is therefore insufficient to establish her as a co-conspirator." *Mendez,* supra, at 130.

Notwithstanding the decision below, the Oklahoma Court of Criminal Appeals cannot find the second party a co-conspirator for the purpose of affirming the conviction of the principal when the second party has had the charges against her dismissed for insufficient evidence. There being no co-conspirators within the legal meaning and definition of that term, the Appellant cannot be convicted of conspiracy. To convict him of conspiracy in such circumstances

violates his most elementary right to due process and a fair trial since "a conspiracy cannot be committed by a single individual acting alone." *Herman* v. *United States,* 289 F.2d 362, 368 (5th Cir. 1961).

Although 21 Okl. Stat. 1971, § 421 requires on its face that there must be an agreement by two or more persons to constitute the crime of conspiracy, that statute as construed and applied by the court below is repugnant to the Fourteenth Amendment of the United States Constitution.

The decisions of this Court are clear: (1) a conspiracy must be an agreement between two or more persons to commit a crime, (2) if there is no agreement, there is no conspiracy, and (3) if all other alleged co-conspirators are acquitted or have the charges dismissed for insufficient evidence or the convictions reversed, then the judgment against the remaining conspirator must be vacated. The Oklahoma Court of Criminal Appeals violates these holdings by its decision in the *Pearson* case and thus deprives Appellant of due process of law.

CONCLUSION

The decision below draws into question the validity of a federal statute and relies upon state statutes, as construed and applied, that are repugnant to the Constitution of the United States. The federal questions were raised and specifically addressed by the court's decision. The decision does not rest upon independent non-federal grounds. The ques-

tions are clearly substantial and the holding is in error. For these reasons the judgment of the Oklahoma Court of Criminal Appeals should be reversed.

Respectfully submitted,

STEPHEN JONES
P. O. Box 3339
Enid, Oklahoma 73701
Attorney for Appellant

April, 1977

CERTIFICATE OF SERVICE

I, Stephen Jones, a member of the Bar of the Supreme Court of the United States and counsel of record for Jack O. Pearson, Appellant herein, hereby certify that on the _____ day of _____, 1977, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Jurisdictional Statement on each of the parties herein, as follows:

On the State of Oklahoma, Respondent herein, by depositing such copies in the United States Post Office, in Oklahoma City, Oklahoma, with first class postage prepaid, properly addressed to the post office address of Larry Derryberry, Attorney General of the State of Oklahoma, the above-named Respondent's counsel of record, at the State Capitol in Oklahoma City, Oklahoma.

All parties required to be served have been served. DATED this _____ day of _____, 1977.

_____

Stephen Jones
Post Office Box 3339
Enid, Oklahoma 73701
Attorney for Appellant

APPENDIX A

FILED
In Court of Criminal Appeals
of the State of Oklahoma
NOV 23 1976
ROSS N. LILLARD, JR.
CLERK

IN THE COURT OF CRIMINAL APPEALS OF
THE STATE OF OKLAHOMA

JACK O. PEARSON, Appellant,	)	
-vs-	)	No. F-75-430
THE STATE OF OKLAHOMA, Appellee.	)	

-OPINION-

BUSSEY, Judge:

Appellant, Jack O. Pearson, hereinafter referred to as the defendant, was charged, tried and convicted by a jury in Oklahoma County, for the offense of Conspiracy to Commit Murder in the First Degree, in violation of 21 O.S. 1971, § 421, Case No. CRF-74-2921. On the information, George Kriz and Linda Pearson were also named as co-conspirators. However, George Kriz was granted immunity in exchange for his testimony, and the charge against Linda Pearson was dismissed prior to trial. As a result, the defendant was the sole conspirator tried and convicted. He was sentenced to a Five Hundred Dollar fine ($500.00), which was suspended, and a term of two (2) years in the State Penitentiary. From this judgment and sentence, the defendant has perfected a timely appeal to this Court.

The State called as its first witness Mr. George Kriz. Mr. Kriz testified that on August 12, 1974, an individual

whom he identified as the defendant came to his house and introduced himself. Mr. Kriz had not met the defendant prior to that time. The defendant then told Mr. Kriz that he "needed a job done." He inquired if he knew anyone who would do it. Mr. Kriz replied that he knew a "thief who would steal just about anything." The defendant then left, but returned the next day to see if Mr. Kriz had contacted anyone. Mr. Kriz said no but the defendant might go down . . . and talk to Don."[1] Mr. Kriz and the defendant then proceeded to go to Don's house, where Mr. Kriz introduced the defendant to Don Woodyard, but did not listen to any conversation between the two.

Two weeks later, the defendant again visited Mr. Kriz, complaining that Don "hadn't done anything he asked him to do." Mr. Kriz then testified in the following manner:

"MR. MILDFELT:

"Q. Did he tell you what he asked him to do at that time?

"MR. KRIZ:

"A. No.

"MR. MILDFELT:

"Q. Okay. Did he ever tell you why he got in contact with you?

"MR. KRIZ:

"A. Well he told me he had a job to do, was all." (Tr. 18)

On August 29, 1974, Mr. Kriz was arrested by the Midwest City Police. He was taken to the station, where he spoke by telephone with the defendant. In that conversation he arranged the meeting between the defendant and "Rocco," who in reality was Lieutenant Jack Hill of the

[1]Don refers to the State's second witness, Don Woodyard.

Midwest City Police. Shortly thereafter, the defendant met with Lieutenant Hill and Mr. Kriz. After a brief conversation between the defendant and Lieutenant Hill, the defendant was arrested. Mr. Kriz testified that he did not hear the conversation between the defendant and Lieutenant Hill. Furthermore, he testified that he was granted immunity for his testimony.

On cross-examination, Mr. Kriz testified that he never at any time intended to commit a felony.

The State's second witness was Mr. Don Woodyard. Mr. Woodyard testified that on August 13, 1974, Mr. George Kriz brought the defendant over to his home, and introduced him. Mr. Woodyard then testified in the following manner:

"MR. MILDFELT:

"Q. After you were introduced to Mr. Pearson, did you have any conversation with him?

"MR. WOODYARD:

"A. Yes.

"MR. MILDFELT:

"Q. What was the nature of that conversation? What did he say to you and what did you say to him?

"MR. WOODYARD:

"A. Well, He told me he wanted a job done.

"MR. MILDFELT:

"Q. Did he tell you what that job was?

"MR. WOODYARD:

"A. Yes.

"MR. MILDFELT:

"Q. What did he say it was?

"MR. WOODYARD:

"A. That he wanted somebody bumped off.

"MR. MILDFELT:

"Q. Did you ask him what he meant by that?

"MR. WOODYARD:

"A. Yes.

"MR. MILDFELT:

"Q. What did he say to you?

"MR. WOODYARD:

"A. He said he wanted them killed." (Tr. 27)

The witness then went on to identify the intended victims as Mr. and Mrs. Harry Buck, who were the mother-in-law and stepfather-in-law of the defendant. During his conversation with the defendant, Mr. Woodyard received $50.00 from the defendant as a down payment for the "contract." When asked where the defendant got the money Mr. Woodyard testified that the defendant walked back to his car, where his wife was sitting, and returned with $50.00. Mr. Woodyard then told the defendant he would get in touch with "Rocco and Stretch" to get the job done. Further testimony revealed however, that Mr. Woodyard did not know the whereabouts of either Rocco or Stretch, and never made any attempt at contacting them.

Asked whether he had seen the defendant on any other subsequent dates, Mr. Woodyard testified that he saw him on several other occasions. It was during one of those subsequent meetings that the defendant supplied Mr. Woodyard with names and addresses of the intended victims, including car tag numbers and work habits. Mr. Woodyard further testified that on each of these occasions, the defendant's wife was with him, and although she never engaged in any of the conversation, often times she was within

hearing distance of the defendant's and Mr. Woodyard's conversations.

On the day of the final meeting between the defendant and Mr. Woodyard, the defendant was angry at Mr. Woodyard for his failure to contact the hit men, Rocco and Stretch. An altercation arose between the parties resulting in Mr. Woodyard telling the defendant to get out of the yard. The defendant left, and the police were called shortly thereafter.

Mr. Woodyard then went to the Midwest City Police Station, where he made a statement and attempted to arrange a meeting by telephone between the defendant and Lieutenant Hill, who identified himself as the hit man, Rocco. The conversation between Mr. Woodyard and the defendant was recorded by the police, with Mr. Woodyard's consent, and subsequently admitted into evidence to corroborate the testimony of the witnesses.[2] The attempted meeting, however, did not take place as a result of this conversation.

On cross-examination, Mr. Woodyard testified that he never intended to contact Rocco and Stretch, that he in fact did not know their whereabouts, and that he never intended to murder anyone.

The State's third witness was Lieutenant Jack Hill of the Midwest City Police Department. Lieutenant Hill testified that on August 28, 1974, Mr. Woodyard came to the police station and gave a statement relating the events of the recent days. A call was then placed to the defendant, and an attempt was made to arrange a meeting between the defendant and Lieutenant Hill, who identified himself as Rocco. This attempt failed, and further attempts were made on subsequent nights. During one of these conversations

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[2]The record is mute as to the method used in recording this conversation. The defendant's counsel does however, repeatedly refer to the tape as an "electronic recording."

with the defendant, Lieutenant Hill testified that the defendant became apprehensive and said "hold on for just a minute. My wife is talking to me." (Tr. 49).

Finally, a meeting was arranged between the defendant and Lieutenant Hill posing as Rocco. At that meeting the defendant gave Lieutenant Hill a $20.00 bill, and was subsequently arrested.

Lieutenant Hill further testified that all of these conversations between Mr. Woodyard, George Kriz, the defendant, and himself, were recorded on tapes. The prosecution then moved to introduce all of these tapes into evidence over the defendant's objection. A conference was held outside the presence of the jury, and the trial judge admitted only one of the several tapes sought to be introduced. The jury then heard a taped conversation between the defendant, Mr. Woodyard, the defendant's wife, Linda Pearson, and Lieutenant Hill. The contents of this taped conversation corroborated the testimony of Lieutenant Hill and Don Woodyard.

The State's next two witnesses were Harry and Ann Buck, who were the intended victims. Their testimony essentially provided the background leading up to these events. It was established that there were bitter feelings between the defendant and his wife, and Mr. and Mrs. Buck, as a result of civil proceedings involving the custody of Linda Pearson's children from a prior marriage. Mrs. Buck said that she testified against her daughter in those proceedings. Mr. Buck's testimony verified the car tag numbers given to Mr. Woodyard by the defendant, which corresponded to the car tag numbers of the automobiles he owned.

The State also called Ella Reale as a witness. She testified she was a private investigator, who followed the defendant and his wife to 1217 Ferguson, in Midwest City, on August 13, 1974. She then followed them to 516 Shortway, then to 421 Bowman, then back to their home, where

the defendant and his wife changed cars and returned to 516 Shortway.[3]

The State then rested. The defense also rested at this time without calling any witnesses.

We are asked to consider a number of issues on this appeal. The defendant has set out a number of propositions in both his original brief and in his brief in support of his amended petitions for rehearing, all of which in essence attack the sufficiency of the evidence to sustain the conviction of conspiracy to commit murder. In short, we are asked to rule that as a matter of law, the evidence as presented by the State failed to prove the crime of conspiracy, and as such, the trial court erred in overruling the defendant's motion to dismiss, motion for directed verdict, and demurrer to the evidence.

The crime of conspiracy has generally been defined as an agreement between two or more people to perform an unlawful act, or a lawful act in an unlawful manner. Title 21, Oklahoma Statutes, Section 421 states, in pertinent part, where two or more persons conspire to commit a felony, this conspiracy is in itself a felony punishable by a fine not exceeding One Thousand Dollars or by imprisonment in the State Penitentiary not exceeding two years or by both such fine and imprisonment.

The essence of conspiracy therefore, is the unlawful agreement between two or more persons. Although in many jurisdictions this agreement is in itself sufficient to constitute the crime, Oklahoma requires an additional element for the crime of conspiracy. Title 21, Oklahoma Statutes, Section 423 states that:

> "No agreement to commit a felony . . . amounts to a conspiracy, unless some act besides such agreement be

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[3]It had been developed in the testimony of other witnesses that 1217 Ferguson was the home of George Kriz; 421 Bowman was the residence of Don Woodyard; and it was not established who lived at 516 Shortway.

done to effect the object thereof, by one or more of the parties to such agreement."

Therefore, to constitute the crime of conspiracy in Oklahoma, two essential elements are required: an agreement between two or more people to commit an unlawful act, and some overt act by one or more of the parties in furtherance of this agreement.

The defendant contends in his brief that "at most, this defendant was convicted of something that is not unlawful, that is, a one man conspiracy." With this we disagree. The crime of conspiracy, by its very nature, is a crime clothed in secrecy and is very seldom proved by direct evidence. This Court has held in such cases as *Henderson* v. *State*, Okl.Cr., 385 P.2d 930 (1963) in the Sixteenth Paragraph of the Syllabus that:

"Existence of conspiracy need not be established by direct evidence, but proof of circumstances from which existence of conspiracy may fairly be inferred is sufficient."

The defendant argues rather persuasively that no agreement was ever reached between the defendant and George Kriz, because there is no evidence which shows George Kriz ever knew what the object of the conspiracy was, and as such could not agree to commit murder. By his own testimony, Mr. Kriz stated he merely introduced the defendant to Don Woodyard, but was never informed as to the nature of the conversation between Don Woodyard and the defendant.

The defendant also contends that there was no agreement between himself and Don Woodyard, in that Don Woodyard merely feigned acquiescence, but at no time possessed the requisite criminal intent to go through with the murders. Mr. Woodyard testified that he notified the police after the defendant's repeated solicitations, and that he,

Woodyard, had no intent to commit the murders himself, and could not possibly contact Rocco and Stretch because he had no knowledge of their whereabouts. Nor was Don Woodyard charged as a co-conspirator, and though this issue was not argued by the defendant on this appeal, if the State merely proved the conspiracy between the defendant and Don Woodyard, who was not even named as a co-conspirator, the problem of a material variance between allegations and proof would have arisen.

We agree with these contentions of the defendant, that no agreement was ever reached between the defendant, Gorge Kriz, and Don Woodyard. However, the defendant further argues that the "co-defendant Linda Rae Pearson was dismissed from this case prior to jury trial, and that there is no trial testimony concerning any agreement, intent nor conspiracy on her part." With this we do not agree.

The record reveals that on every single occasion that the defendant went to discuss the murder of his in-laws with Don Woodyard, the defendant's wife, Linda Rae Pearson, was present. In regard to the first meeting, where the defendant paid Don Woodyard $50.00 in earnest money, Mr. Woodyard testified in the following manner:

"MR. MILDFELT:

"Q. Did he tell you where he got the [$50.00] or where he was going to get it before he got it?

"MR. WOODYARD:

"A. He just said, just a minute and I will be back and he walked over to the car.

"MR. MILDFELT:

"Q. Who was in the car?

"MR. WOODYARD:

"A. His wife." (Tr. 28)

On another occasion, the defendant handed Don Woodyard the names and addresses, work habits and car tag numbers of the intended victims. The intended victims were the mother and stepfather of Linda Rae Pearson. It was established at trial that they had testified against her in child custody proceedings earlier that year which resulted in Linda Rae Pearson losing custody of her children by a prior marriage.

During one of the taped conversations between Don Woodyard and the defendant, which was admitted into evidence, Linda Rae Pearson took the receiver from her husband, the defendant, and said "Don, why don't you just come up with the fifty, and we'll forget the whole thing." The defendant would have us believe that this statement is strong evidence indicating abandonment of the conspiracy, and with this we agree. However, from the same statement, it is reasonable to infer that the defendant and Linda Rae Pearson had in fact entered into an agreement to commit murder.

In *Hutchman* v. *State*, 61 Okl.Cr. 117, 66 P.2d 99 (1937), this Court stated:

> "The courts of this country have often held that it is not necessary that a conspiracy be proved by direct testimony, in fact, conspiracies are seldom susceptible to such proof. It is often proved by circumstances. We call attention to the case of Mathews v. State, 19 Okl. Cr. 153, 198 P. 112, 117 wherein the court says:
>
> " 'A conspiracy, leading up to the commission to the crime charged need not be established by direct evidence, but may and generally must be proved by a number of independent acts, conditions, and circumstances. The very existence of a conspiracy is generally a matter of inference deduced from certain acts of the persons accused, done in pursuance of an apparently criminal or unlawful common purpose.

> " 'It is not necessary to prove that the conspirators came together and actually agreed to pursue their purpose by common means, one performing one part and another another. If one concurs in a conspiracy, no proof of an agreement to concur is necessary to make him guilty . . .' "

See, also, *Henderson* v. *State*, Okl.Cr., 385 P.2d 930 (1963).

We therefore hold that there was competent evidence from which the trier of facts could reasonably conclude that an agreement to commit murder had been entered into between the defendant and Linda Rae Pearson, and that this Court will not interfere with the jury's findings, since it is the exclusive province of the jury to weigh the evidence and determine the facts. See, *Campbell* v. *State*, Okl.Cr., 546 P.2d 276 (1976).

Having established that there was competent evidence from which a jury could reasonably conclude an agreement had been entered into between the defendant and Linda Rae Pearson, we now address ourselves to the question of whether there was an overt act in furtherance of the objective of the agreement. The defendant contends in his petition for rehearing, and in his brief in support of his petition, that under 21 O.S. 1971, § 423:

> ". . . there must have been, . . . evidence of an agreement to commit murder and an act must be done in furtherance of the objective of the *agreement to commit murder*." (Emphasis original)

The defendant urges that the payment of the $50.00 by defendant to Don Woodyard, as well as supplying information concerning the intended victim's work habits, are not overt acts in furtherance of the agreement. Rather, such acts are part and parcel of the agreement itself. We are asked by the defendant "not to strain logic and reason to reach a result which does not flow naturally from the proven facts."

We feel that the defendant's argument rests on the erroneous assumption that the agreement to commit murder existed between the defendant and Don Woodyard, and that the payment of the $50.00 and supplying information is of necessity a part of the agreement itself and not an overt act. But we need only point out to the defendant that the evidence supports a finding that the agreement to commit murder existed between the defendant and Linda Rae Pearson. Therefore, the payment of the $50.00 by the defendant, the supplying of names, addresses, work habits and car tag numbers of the intended victims were in fact overt acts in furtherance of the pre-existing agreement to commit murder between the defendant and Linda Rae Pearson. See, *Wright* v. *State*, Okl.Cr., 535 P.2d 315 (1975).

While unnecessary to the determination of the issues here presented, we make reference to the case of *State* v. *Mandel*, 78 Ariz. 226, 278 P.2d 413 (1954). That case is, in almost every respect, factually identical to the case at bar. The Arizona court therein held that where the defendant hired another party to commit murder, supplied the money, as well as information concerning the intended victims whereabouts, these acts by the defendant were sufficient overt acts to constitute the crime of attempted murder. See, also, *State* v. *Gray*, 4 Wash. App. 834, 486 P.2d 341 (1971). Whether the hiring of a party to commit murder, and supplying a would be murderer with money and information, are sufficient overt acts by the solicitor to constitute attempted murder, we do not now decide, but reserve our answer for a more appropriate case. But in the opinion of this Court, such acts by the defendant in the instant case are sufficient overt acts in furtherance of the object of the conspiracy. Accordingly, we are of the opinion that the State presented sufficient evidence reasonably tending to sustain the allegations charged, and that the trial court properly overruled the defendant's motion to dismiss, motion for a directed verdict, and demurrer to the evidence.

We come now to the defendant's next assignment of error. The defendant contends that the introduction of the taped conversation between the defendant and Don Woodyard was inadmissible and highly prejudicial to the defendant. The defendant cites as authority the case of *Cameron* v. *State*, Okl.Cr., 365 P.2d 576 (1961), wherein this Court held that where one party to a telephone conversation consents to a recording without the second party's knowledge or consent, such a recording may not be used as evidence against the nonconsenting party. The defendant also cites 21 O.S. 1971, § 1757 which states, in pertinent part:

> "Any person who . . . fraudulently or without legal authority connects to any telephone or telegraph line or wire any instrument or other apparatus capable of being used in intercepting messages, communications or conversations, is guilty of a misdemeanor . . ."

The thrust of the *Cameron* decision and its interpretation of 21 O.S. 1971, § 1757, seems to be that neither party to a conversation may consent to a recording, if such a recording involves a physical intrusion into the telephone lines. This Court held in *Cameron*, supra, that,

> "If the evidence had been obtained by listening in over the receiver of the extension, either [party] could publish the conversation . . . But neither party under our statute can tap the telephone lines, for such would be unauthorized infringement on the company lines . . ."
>
> "There can be no legal tap of such facility without the consent of the person who originates the conversation, the one who responds to it, and the telephone company. A legal tap could not be made by any party in any other way."

In *Williams* v. *State*, Okl.Cr., 507 P.2d 1339 (1973) a manager of a motel received a call from room number 5

on the motel office telephone. After answering the phone, there was no response from the calling party, but the manager heard a "loud disturbance" coming from the room. He then made a tape recording of these sounds, and this tape was admitted into evidence. This Court there held that,

> "There was no tap on the line or interference with the normal telephone lines . . . The motel manager . . . merely recorded that which he, as the proper party to the telephone line, could hear."

The *Williams* case, supra, went on to say that merely recording a conversation with the consent of one of the parties by placing a device against the side of the telephone is not an "intercept" under our statute and is therefore permissible. The *Cameron* decision, supra, on the other hand, holds that if a party to the conversation consents to a recording, and such recording is effected by the slightest physical interference with the telephone line, such as a small splice in the wires, this constitutes an unlawful "intercept" and is impermissible. The purpose of the wire tap statute, according to *Cameron*, supra, ". . . was designed, among other things, to protect not only the privacy of users and subscribers of telephone service, but the telephone company facilities against intermeddling mischief makers and trespassers."

For reasons which are to become apparent, we no longer adhere to the holding in the *Cameron* decision.

In *Rathbun* v. *United States*, 355 U.S. 107, 78 S.Ct. 161, 2 L.Ed.2d 134 (1957), the United States Supreme Court held:

> "The communication itself is not privileged and one party may not force the other party to secrecy merely by using a telephone . . . either party may record the conversation and publish it."

The *Cameron* decision itself recognized this principle, when it stated, ". . . if the evidence had been obtained by listening in over the receiver of the extension, either [party] could publish the conversation . . ." See, also, *Lopez* v. *United States*, 373 U.S. 427, 83 S.Ct. 1381, 10 L.Ed.2d 462 (1963); *Hoffa* v. *United States*, 385 U.S. 293, 87 S.Ct. 408, 71 L.Ed.2d 374 (1966).

Taken together, these cases establish the principle that one who voluntarily enters into a conversation with another takes the risk that such person may memorize, record, or even transmit the conversation. Therefore, when Don Woodyard gave his consent to record the conversation between himself and the defendant, the conversation was divested of its private character. Consequently, 21 O.S. 1971, § 1757 can offer no protection of privacy to a conversation no longer deemed to be private.

The State wire tap law, however, must be read in conjunction with the applicable federal law. We must now determine whether such a tape recording is in violation of Title III of the Omnibus Crime Control & Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520. This act by Congress is a comprehensive statute defining on a uniform basis the circumstances and conditions under which the interception of wire and oral communication may be authorized. Although we feel that the act has not pre-empted the field of electronic surveillance, it has at the very least set minimal standards with which all states must comply. The act clearly states that wherever any wire or oral communication is intercepted, it may not be used as evidence in any trial, hearing, or other proceeding in any court of the United States, any state, or any political subdivision thereof if disclosure would be in violation of the act. See, 18 U.S.C. § 2515.

Title III, however, sets out a number of exceptions to the general provision prohibiting unlawful intercepts. Title 18, United States Code Section 2511(2)(d) states:

> "It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State or for the purpose of committing any other injurious act."

Under the facts and circumstances in the instant case, we do not feel that the recording was made for the purpose of committing any unlawful act. On the contrary, it was made to further the ends of justice, and in aid of legitimate law enforcement. We therefore conclude that Don Woodyard's consent to the taping of the conversation was proper, and such recording did not constitute an "unlawful intercept" as prohibited by the federal act. See *United States* v. *Riccobene*, 320 F.Supp. 196 (S.D. Pa. 1970) Affirmed, 451 F.2d 586 (3rd. Cir. 1971); *People* v. *Patrick*, 46 Mich. App. 678, 208 N.W.2d 604 (1973).

Nor, do we believe that 21 O.S. 1971, § 1757 should be interpreted to mean that a telephone recording made through the use of a suction cup device is not an intercept, where one made by "splicing wires" is an intercept, and is therefore prohibited. Where there is consent by either one or more of the parties to a telephone conversation, distinctions between the methods employed in the taping of the conversations are inconsequential.

We therefore hold that where one person is a party to a telephone conversation, such person has the lawful authority to record, or permit another to record, the contents of the conversation for any legitimate purpose. The laws pertaining to eavesdropping and the recording of telephone communications do not apply where one of the parties to

the conversation consents to or directs its overhearing or recording. *People* v. *Canard*, 257 Cal. App.2d 444, 65 Cal. Rptr. 15 (1967), cert. denied 393 U.S. 912, 89 S.Ct. 231, 21 L.Ed.2d 198. Furthermore, such recordings may be made by any reasonable means, as long as the methods employed do not cause serious injury to the telephone lines or interrupt other telephonic communications so as to necessitate repair by the telephone company. To adhere to the rigid standards set out in *Cameron*, supra, i.e. where the consent of all parties to a conversation is required, including the telephone company would lead to the anomalous result whereby the right of privacy in the use of the telephone has greater sanctity than the right of privacy in the home. With this we cannot agree, and to the extent that *Cameron* v. *State*, supra, is inconsistent with this opinion, it is hereby overruled.

Accordingly, the defendant's second assignment of error is without merit.

Lastly, defendant contends that the court failed to adequately instruct the jury by refusing to give certain instructions and by the giving of others. This assignment of error is also without merit. A careful reading of the instructions given the jury show that taken as a whole, they set forth the law of the State of Oklahoma regarding conspiracy. Defendant's requested instructions are not supported by Oklahoma case law. Further, even if support could be found for defendant's contentions in Oklahoma law, it is not necessary that the court instruct the jury in precisely the language requested by the defendant. It is enough if the court instructs on the general principle of the law of the case. See, *Trowbridge* v. *State*, Okl.Cr., 502 P.2d 495 (1972), citing with approval *Butler* v. *United States*, 197 F.2d 561 (10th Cir. 1952).

For all of the above and foregoing reasons, the judgment and sentence appealed from should be, and is hereby, *AFFIRMED*.

[APPENDIX]

AN APPEAL FROM THE DISTRICT COURT,
OKLAHOMA COUNTY, OKLAHOMA,
HONORABLE CARMON C, HARRIS, JUDGE,

JACK O. PEARSON, appellant, was convicted for the offense of Conspiracy to Commit Murder in the First Degree; was sentenced to Five Hundred Dollar ($500.00) fine, which was suspended and a term of two (2) years in the State Penitentiary, and he appeals. Judgment and sentence AFFIRMED.

PETER K. SCHAFFER,
OKLAHOMA CITY, OKLAHOMA

Attorney for Appellant,

OPINION BY BUSSEY, J.,
BRETT, P. J., AND
BLISS, J., CONCUR.

LARRY DERRYBERRY, ATTORNEY GENERAL,
MICHAEL JACKSON, ASST. ATTY. GEN.,
JOE MARK ELKOURI, LEGAL INTERN,

Attorneys for Appellee.

APPENDIX B

PEARSON v. STATE.

No. F-75-430 February 5, 1976

BUSSEY, J. Appellant, Jack O. Pearson, hereinafter referred to as defendant, was charged, tried and convicted by a jury in Oklahoma County for the offense of Conspiracy to Commit Murder in the First Degree, in violation of 21 O.S. 1971, § 421. He was sentenced to a fine of Five Hundred ($500.00) Dollars, which was suspended, and a term of two (2) years in the penitentiary. From the judgment and sentence a timely appeal has been perfected to this Court.

The State's first witness was George Kriz, who testified that on August 12, 1974, an individual whom he identified as the defendant, came to his home and introduced himself. Mr. Kriz testified that he had not met the defendant prior to that time. Defendant told Mr. Kriz he "needed a job done" and asked for the witness' help in locating someone to do it. Mr. Kriz told defendant that he knew a "thief" who would "steal just about anything," and that he would check with him. The next day defendant returned and the witness told him he could not locate the first individual, but suggested he contact Don Woodyard. Later that same evening Kriz introduced defendant to Woodyard, but did not hear any conversation between them. The witness testified that the next time he saw the defendant was some two weeks later. At that time the defendant returned to the home of Mr. Kriz and complained that Don had not yet done anything.

On August 29, 1974, the witness was arrested by the Midwest City police. He was taken to the station where he spoke by telephone with the defendant. In that conversation the witness arranged for a meeting between defendant and "Rocco," who in reality was Lt. Jack Hill of the Midwest City Police Department. A few minutes after the conversa-

tion the witness and Lt. Hill went to the Planet Bowl in Midwest City where the witness introduced the two men to each other. Following a conversation of a few minutes, Lt. Hill and Mr. Kriz returned to Kriz's home, and waited for the defendant. When defendant arrived, Kriz stepped back and did not hear the conversation between the defendant and Lt. Hill. He observed the defendant hand something to Lt. Hill, and then Hill placed the defendant under arrest.

Mr. Kriz also testified that he had been granted immunity and the charges against him were dismissed in this same case. He also testified that during his several transactions with the defendant he had never intended to commit any crime.

The State's next witness was Don W. Woodyard, who testified that in August, 1974, he was introduced to the defendant by George Kriz. He testified that the defendant told him he wanted someone "bumped off," or killed. He testified that defendant identified these people as his wife's mother and stepfather. Woodyard stated that defendant gave him $50.00, and Woodyard told defendant he would have to "get a hold of somebody" to do the job. The witness and the defendant met on several other occasions and each time the defendant questioned the witness about his progress. The defendant also supplied the witness with information regarding the intended victims. Woodyard testified that he never did try to contact anyone to do the job, but told the defendant he would try to get Rocco and Stretch to do it. Rocco and Stretch were men with whom the witness was acquainted, but he did not know of instances when they had held themselves out to be killers for hire. He further testified that he never made any attempt to contact Rocco and Stretch, and in fact, did not know where to locate them.

Woodyard testified that on August 28th, he and the defendant quarreled over the fact that nothing had been done. The witness' wife called the police, who arrived after

defendant had left. At that time, the witness related the events of the recent days. He went to the police station where he attempted to arrange a meeting between defendant and Lt. Hill, who would pose as Rocco. He was unsuccessful.

On cross-examination, the witness testified that he never, at any time, intended to participate in a killing, or to locate Rocco and Stretch.

The State's next witness was Jack Hill, a detective with the Midwest City Police Department. He testified that on August 28, 1974, he interviewed Don Woodyard at the Midwest City Police Station, and that following that interview he began an investigation. He testified that a call was made to "Jim" at the number given by defendant[1] and that he listened on the extension while Mr. Woodyard talked. He testified that on each of the two following evenings, calls were also made on the third evening he talked to "Jim," posing as Rocco. Finally, arrangements were made by George Kriz for Detective Hill to meet defendant. After the initial meeting at the Planet Bowl, the detective met defendant again, approximately one hour later, at the home of George Kriz, where defendant gave the detective a twenty dollar bill and a drawing of the home of the intended victims. At that time the defendant was arrested.

The jury then heard a taped recording of the conversations between the defendant and Don Woodyard and the telephone conversation between the defendant and Detective Hill as Rocco.

The State then presented the testimony of Ann Buck, the defendant's mother-in-law. She testified that she had testified against her daughter and the defendant in a custody hearing regarding her grandchildren.

---

[1] The officer testified at one point that Mr. Woodyard made the call, and at another point that he made the call himself.

The next witness was Harry F. Buck, the stepfather of defendant's wife. He testified to several conversations with defendant, all arising from the litigation surrounding the custody of the children of defendant's wife. He also testified that the tag numbers given Don Woodyard corresponded, in some respects, to those on cars he owned.

The State's next witness was Oleta Stewart, the mother of the defendant. She testified that she was with defendant on the evening of August 12th, the date he allegedly met with George Kriz and Don Woodyard. She testified that she accompanied her son several times but did not know the names of the individuals he met, nor the addresses.

The next witness for the State was Ella Reale, who testified she was a private investigator who followed Mr. and Mrs. Pearson to 1217 Ferguson, in Midwest City, on August 13, 1974. She then followed them to 516 Shortway, then to 421 Bowman, then back to their home, where Mr. and Mrs. Pearson changed cars and returned to 516 Shortway.[2]

The State then rested. The defense rested without calling any witnesses.

The defendant first argues that the court erred in overruling his demurrer to the evidence, his motion to dismiss, and his motion for directed verdict. In his brief, he argues that he was "convicted of something that is not unlawful, that is, a one-man conspiracy." (Appellant's brief, p. 6). He bases his argument on two facts, (1) George Kriz did not testify to an agreement to kill; (2) Don Woodyard testified he never intended to commit the murders or to commit a felony.

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[2] It had been developed in the testimony of other witnesses that 1217 Ferguson was the home of George Kriz; 421 Bowen was the residence of Don Woodyard; and it was not established who lived at 516 Shortway.

We find sufficient evidence of a conspiracy to justify submission of the question to the jury. George Kriz did testify to an agreement with the defendant to aid him in finding someone to "do a job," although the specifics of the "job" were not spelled out. George Kriz did, in fact, arrange for defendant to meet Don Woodyard. In spite of Don Woodyard's testimony, the fact remains that Woodyard did accept money from defendant, he continued to discuss the plan with defendant for a period of days (in fact, until he was forced to admit the plan to the police), and give all outward manifestations of entering the conspiracy. From the time George Kriz agreed to put defendant in touch with someone to "do a job," a jury could reasonably find that a conspiracy existed. By placing defendant in contact with Don Woodyard, and by defendant's payment to Woodyard, the second element, that of an act toward the end, was accomplished.

In *Hutchman* v. *State*, 61 Okl. Cr. 117, 66 P.2d 99 (1937), this Court stated:

> "The courts of this country have often held that it is not necessary that a conspiracy be proved by direct testimony, in fact, conspiracies are seldom susceptible to such proof. It is often proved by circumstances. We call attention to the case of Mathews v. State, 19 Okl. Cr. 153, 198 P. 112, 117 wherein the court says:
>
> " 'A conspiracy, leading up to the commission of the crime charged need not be established by direct evidence, but may and generally must be proved by a number of independent acts, conditions, and circumstances. The very existence of a conspiracy is generally a matter of inference deduced from certain acts of the persons accused, done in pursuance of an apparently criminal or unlawful common purpose.
>
> " 'It is not necessary to prove that the conspirators came together and actually agreed to pursue their purpose by common means, one performing one part and

another another. If one concurs in a conspiracy, no proof of an agreement to concur is necessary to make him guilty. . . .' "

See, also, *Henderson* v. *State*, Okl. Cr., 385 P.2d 930 (1963).

Accordingly, it was not error to submit the case to the jury based on the evidence presented by the State. Further, there is sufficient evidence from the testimony of Kriz and Woodyard for a jury to make a determination of guilt. We have repeatedly held that where there is conflict in the evidence, or the evidence is such that different inferences may be drawn, this Court will not interfere with a jury's determination on the grounds of insufficiency to sustain a conviction where there is competent evidence in the record from which the jury might reasonably conclude the defendant is guilty. See, for example, *Hudson* v. *State*, Okl. Cr., 399 P.2d 296 (1965); *Stanford* v. *State*, 450 P.2d 234 (1969); *Mitchell* v. *State*, Okl. Cr., 467 P.2d 509 (1970). We would note that defendant presented no other evidence in his behalf to further contradict the testimony of the State's witnesses. Defendant's first assignment of error is without merit.

For his second assignment of error, defendant submits that the tape recording admitted by the court is incompetent, irrelevant and prejudicial. In his argument supporting this contention he cites authority which goes to the legality of the method of obtaining the recording. The tape recording admitted by the court consists of a statement made at the Midwest City Police Station by Don Woodyard and of a conversation between Don Woodyard, defendant, and Detective Hill acting as "Rocco." There is nothing on this tape which was not testified to by either Detective Hill or Don Woodyard.

Defendant relies on *Cameron* v. *State*, Okl. Cr., 365 P.2d 576 (1961) for the authority that evidence obtained by a telephone recording done without the knowledge and

consent of one party to a conversation could not be admitted against him. That case contains a full and complete discussion of the Oklahoma statute and law on point, and under the rule of that case, that portion of the tape recording which contained the telephone conversation between defendant and the witnesses was inadmissible. However, defendant's reliance on *Cameron* as requiring reversal is misplaced. The *Cameron* case involved a conviction for perjury, which requires the testimony of two witnesses, or the testimony of one credible witness coupled with other corroborating evidence. The inadmissible taped conversation was the corroboration in *Cameron*, and without it, the State could not make its case, so reversal was required.

In the case at bar a different situation arises. The taped conversation adds nothing new to the proof. It is merely cumulative. While its admission was error, it is not reversible error. This Court has held on numerous occasions, most recently in *Constabile* v. *State*, Okl. Cr., 513 P.2d 588 (1973), that admission of evidence which is merely cumulative will not be held reversible error even though the evidence is inadmissible. See, also, *Copus* v. *State*, 26 Okl. Cr. 366, 224 P. 364 (1924); *Allcott* v. *State*, 55 Okl. Cr. 128, 25 P.2d 1112 (1933); *Young* v. *State*, Okl. Cr., 373 P.2d 273 (1962). Accordingly, defendant's second assignment of error is without merit.

Lastly, defendant contends that the court failed to adequately instruct the jury by refusing to give certain instructions and by the giving of others. This assignment of error is also without merit. A careful reading of the instructions given the jury show that taken as a whole, they set forth the law of the State of Oklahoma regarding conspiracy. Defendant's requested instructions are not supported by Oklahoma case law. Further, even if support could be found for defendant's contentions in Oklahoma law, it is not necessary that the court instruct the jury in precisely the language requested by defendant. It is enough

if the court instructs on the general principle of the law of the case. See *Trowbridge* v. *State*, Okl. Cr., 502 P.2d 495 (1972), citing with approval *Butler* v. *United States*, 197 F.2d 561 (10th Cir.).

For all of the above and foregoing reasons, the judgment and sentence appealed from is AFFIRMED.

Appeal from District Court, Oklahoma County; Carmon C. Harris, Judge.

JACK O. PEARSON was convicted for the offense of Conspiracy to Commit Murder; was sentenced to two (2) years imprisonment and a $500.00 fine; and appeals. AFFIRMED.

D. C. Thomas, Oklahoma City, attorney for appellant

Larry Derryberry, Atty. Gen., Michael Jackson, Asst. Atty. Gen., Joe Mark Elkouri, Legal Intern, attorneys for appellee.

BRETT, P. J., concurs in results.

BLISS, J., concurs.

APPENDIX C

FILED
In the Court of Criminal Appeals
of the State of Oklahoma
MARCH 7, 1977
ROSS N. LILLARD, JR.
CLERK

IN THE COURT OF CRIMINAL APPEALS OF
THE STATE OF OKLAHOMA

JACK O. PEARSON, Appellant,	)	
-vs-	)	No. F-75-430
THE STATE OF OKLAHOMA, Appellee.	)	

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Jack O. Pearson, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Criminal Appeals for the State of Oklahoma, affirming the judgment of the conviction, said Order entered herein on December 22, 1976.

This appeal is taken pursuant to 28 U.S.C. §1257(1) (2).

Respectfully submitted,

s/ Stephen Jones
Stephen Jones
Attorney for Appellant

CERTIFICATE OF MAILING

This is to certify that a true and correct copy of the foregoing Notice of Appeal was mailed to Larry Derryberry, Attorney General, State Capitol Building, Oklahoma

City, Oklahoma, and Andrew Coats, District Attorney, Oklahoma County Courthouse, Oklahoma City, Oklahoma, 73102, on this 3rd day of March, 1977.

s/ Stephen Jones
Stephen Jones

APPENDIX D

FILED
In Court of Criminal Appeals
of the State of Oklahoma
DEC 20 1976
ROSS N. LILLARD, JR.
CLERK

IN THE COURT OF CRIMINAL APPEALS OF
THE STATE OF OKLAHOMA

JACK O. PEARSON, Appellant,	)	
-vs-	)	No. F-75-430
THE STATE OF OKLAHOMA, Appellee.	)	

ORDER DENYING PETITION FOR REHEARING, DENYING MOTION TO STAY MANDATE AND DIRECTING ISSUANCE OF MANDATE FORTHWITH

NOW, on this 20th day of December, 1976, the Court having examined the Petition for Rehearing and Motion to Stay Mandate filed in the above styled and numbered cause, and after complete examination of the record finds that the Petition for Rehearing should be DENIED.

The Court further finds that the Motion to Stay Mandate should be DENIED, and the Clerk of this Court is directed to issue the Mandate FORTHWITH.

IT IS SO ORDERED.

WITNESS OUR HANDS, and the Seal of this Court, this 30th day of December, 1976.

s/ Tom Brett
TOM BRETT, PRESIDING JUDGE

s/ Hez J. Bussey
HEZ J. BUSSEY, JUDGE

ATTEST:

s/ Ross N. Lillard, Jr.
CLERK

[Seal]

Supreme Court, U. S.
FILED
MAY 12 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1454

JACK O. PEARSON,
Appellant,

VERSUS

THE STATE OF OKLAHOMA,
Appellee.

ON APPEAL FROM THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MOTION TO DISMISS OR AFFIRM

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May, 1977

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In the
Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1454

JACK O. PEARSON,
Appellant,

VERSUS

THE STATE OF OKLAHOMA,
Appellee.

ON APPEAL FROM THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

MOTION TO DISMISS OR AFFIRM

The appellee moves the Court to dismiss the appeal herein, or, in the alternative, to affirm the judgment of the Court of Criminal Appeals of the State of Oklahoma on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I.
CHALLENGE TO JURISDICTIONAL STATEMENT

The appellant maintains that this Court has jurisdiction for the reason that the decision of the Court of Criminal Appeals construes 21 O.S. 1971, §§ 421 and 1757, in a man-

ner which violates the Fourteenth Amendment of the United States Constitution. However, it is submitted that, upon a review of the jurisdictional statement submitted by the appellant, this Court will find that the issues involved do not directly relate to the constitutionality of the heretofore mentioned state statutes. It is submitted that the issues presented are (1) the sufficiency of the evidence to sustain the conviction and (2) admissibility of evidence secured through electronic recording. It is thus submitted that the issues do not present a case reviewable under 28 U.S.C., § 1258.

II.
NATURE OF THE CASE

A. ISSUES PRESENTED

Appellant sets forth six questions to be considered in the Jurisdictional Statement. However, appellee respectfully submits that there are, in fact, only two issues, to-wit:

(1) Is the Fourth Amendment prohibition against unreasonable searches and seizures violated by the introduction into evidence of tapes of telephone conversations made with the consent of one of the participants?

(2) Was the evidence introduced at trial sufficient to establish that the appellant was guilty of the crime of Conspiracy to Commit Murder?

B. THE PROCEEDINGS BELOW

The appellant, Jack O. Pearson, was charged, tried and convicted in the District Court of Oklahoma County, State of Oklahoma, Case No. CRF-74-2921, for the crime of Con-

spiracy to Commit Murder in the First Degree. Appellant was sentenced in accordance with the unanimous verdict of the jury to serve a term of two (2) years imprisonment; a fine of Five Hundred Dollars ($500.00) was suspended by the court. From said Judgment and Sentence, the appellant appealed to the Oklahoma Court of Criminal Appeals, Case No. F-75-430. On February 5, 1976, that court entered a decision affirming the Judgment and Sentence [Appendix B of the Appellant's Jurisdictional Statement]. However, upon defendant's application for rehearing, the court withdrew the mandate previously issued and reconsidered the briefs subsequently submitted. On November 23, 1976, the Oklahoma Court of Criminal Appeals issued a second opinion wherein the Judgment and Sentence was again affirmed [Appendix A of the Jurisdictional Statement]. The second opinion of the court is reported at 556 P.2d 1025 (Okl. Cr. 1976).

III.
STATEMENT OF CASE

By Information filed in Case No. CRF-74-2921, George Kriz, Linda Pearson, and Jack O. Pearson were charged as co-conspirators for the crime of Conspiracy to Commit Murder in the First Degree, in violation of 21 O.S. 1971, § 421. George Kriz was granted immunity in exchange for his testimony; pursuant to the State's request for dismissal, the action against Mr. Kriz was dismissed. The statement of testimony contained in paragraph one of the Judisdictional Statement is hereby adopted as an accurate statement regarding the testimony introduced at trial. However, appellee challenges the statement of facts contained in para-

graph two [page 7 of the Jurisdictional Statement] wherein the appellant states that Linda Pearson was dismissed by the District Court for insufficient evidence. It is submitted that upon a review of the record this Court will find that Linda Pearson was dismissed by the District Court subsequent to the preliminary hearing and prior to trial. However, there is no order contained in the record which would reflect the reason for dismissal. The Oklahoma Court of Criminal Appeals found, from the testimony adduced at trial, that Linda Pearson was a co-conspirator and that the evidence was sufficient to establish that the appellant was guilty of the crime of Conspiracy to Commit Murder.

IV.
ARGUMENT

A. ADMISSION OF THE RECORDINGS MADE BY AN ELECTRONIC DEVICE WAS PROPER.

In the first proposition of error, appellant maintains that the introduction of a tape recording of a telephone conversation was in violation of the Fourth Amendment prohibition against unlawful search and seizure. Appellant attempts to distinguish this Court's decisions in *United States* v. *White*, 401 U.S. 745, and *Rathbun* v. *United States*, 355 U.S. 107 (1957), from the case at bar. In the opinion now being appealed, the Oklahoma Court of Criminal Appeals relied upon prior decisions by this Court in determining that one who voluntarily enters into a conversation with another takes the risk that such person may memorize, record, or even transmit the conversation. See *Rathbun*, supra; *Lopez* v. *United States*, 373 U.S. 427 (1963); *Hoffa* v. *United States*, 385 U.S. 293 (1966). The court concluded

that the recording in question was between Don Woodyard and the appellant. Don Woodyard gave his consent to record the conversation between himself and the appellant and, thus, the conversation was divested of its private character. The court concluded that the recording did not constitute an "unlawful intercept" as prohibited by the State law [21 O.S. 1971, § 1757], and the related federal act [Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C., §§ 2510 through 2520].

Appellee respectfully submits that as stated by the United States Court of Appeals for the Sixth Circuit in *United States* v. *Hodge*, 539 F.2d 898 (6th Cir. 1976):

> "No one has a constitutionally protected expectation that the person to whom he voluntarily reveals incriminating information will keep it a secret, the consensual interceptions permitted under this provision [18 U.S.C., § 2551(2)(c)] do not offend the Fourth Amendment."

See also, *United States* v. *Quintana*, 508 F.2d 867 (7th Cir. 1975).

B. THE EVIDENCE WAS SUFFICIENT TO ESTABLISH THAT THE APPELLANT CONSPIRED TO COMMIT A FELONY.

In the second proposition of error appellant maintains that the conviction is violative of the Fourteenth Amendment of the United States Constitution in that the State failed to establish that there was an agreement by two or more persons to constitute the crime of Conspiracy. The appellant argues that due to the dismissal of the two alleged co-conspirators the judgment against the remaining conspirator must be vacated.

The Oklahoma Court of Criminal Appeals stated that the testimony at trial clearly established that Linda Pearson was a co-conspirator within the legal meaning and definition of that term. Appellant maintains that the dismissal of Linda Pearson subsequent to the preliminary hearing was proof that there was "insufficient evidence" to sustain the charges. It is submitted that the record is silent regarding the reason for dismissal. However, it is clear that the dismissal was made prior to the trial and thus not on the merits of the testimony presented at the trial. It is submitted that neither the guilt nor the innocence of the alleged co-conspirator, Linda Pearson, was settled by the dismissal prior to trial.

It is not necessary, in order to sustain a conviction for conspiracy, that co-conspirators be charged or convicted. See *Ng Pui Yu* v. *United States*, 352 F.2d 626 (9th Cir. 1965). It is submitted that upon a review of the testimony this Court will conclude that the evidence was sufficient to sustain a conspiracy conviction.

CONCLUSION

Appellee submits that the tape recording of the telephone conversation was admissible and not in violation of the Fourth Amendment of the United States Constitution. Appellee further submits that the evidence adduced at trial was sufficient to establish that the defendant was a co-conspirator in the crime of Conspiracy to Commit a Murder.

WHEREFORE, appellee respectfully submits that the questions presented by the appellant are so unsubstantial as not to need further argument. Appellee respectfully

moves this Court to dismiss the appeal or in the alternative to affirm the judgment entered in this cause by the Oklahoma Court of Criminal Appeals.

Respectfully submitted,

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Counsel for Appellee

May, 1977

CERTIFICATE OF SERVICE

This is to certify that three true and correct copies of the instrument to which this certification is attached were mailed to the following named counsel this ..... day of May, 1977:

Mr. Stephen Jones
Attorney-at-Law
P. O. Box 3339
Enid, Oklahoma 73701
Attorney for Appellant

KAY KAREN KENNEDY

Supreme Court, U. S.
FILED
MAY 17 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1454

JACK O. PEARSON,
Appellant,

VERSUS

THE STATE OF OKLAHOMA,
Appellee.

ON APPEAL FROM THE OKLAHOMA COURT OF CRIMINAL APPEALS

APPELLANT'S REPLY MEMORANDUM TO MOTION TO DISMISS OR AFFIRM

STEPHEN JONES
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May, 1977

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

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Although Appellee makes a "challenge to the jurisdictional statement" the Appellee neither explains nor develops its "challenge" either by citations to the record or to holdings of this Court.

None of the authorities or reasonings submitted by the Appellant in his statement of the case (pp. 6-10 of the Jurisdictional Statement) are questioned, or distinguished.

Nor does Appellee refute that the questions are substantial.

Thus, Appellee's "challenge" is undeveloped and unexplained.

Appellee does not challenge our thesis that a majority of this Court has never upheld warrantless consensual re-

cording of telephone conversations. The two cases relied upon by the Appellee are inapposite. *Lopez* v. *United States*, 373 U.S. 427 (1963), did not involve monitoring and recording of a telephone conversation. *Hoffa* v. *United States*, 385 U.S. 293 (1966), involved the use of secret agents and there was no electronic eavesdropping or recording involved.

The Appellee attempts to distract the Court's attention from our second argument by a bold face caption, "The Evidence Was Sufficient to Establish that the Appellant Conspired to Commit a Felony." This was not the issue presented in the Jurisdictional Statement. The question is whether the Oklahoma statute on conspiracy, as construed and applied in this case, which permits a defendant to be found guilty of conspiracy when all other co-conspirators have been dismissed, either by the trial court or the appellate court for insufficient evidence, is repugnant to the United States Constitution. Appellant fully agrees with the statement "It is not necessary, in order to sustain a conviction for conspiracy, that co-conspirators be charged or convicted." However, this is not the factual situation here. When all co-conspirators have been charged and the charge is dismissed for insufficient evidence, those same individuals cannot be found to be conspirators in order to meet the plurality requirement of the Constitution of the United States that a conspiracy consists of more than one person.

Respectfully submitted,

STEPHEN JONES
P. O. Box 3339
Enid, Oklahoma 73701
Attorney for Appellant

May, 1977

CERTIFICATE OF SERVICE

I, Stephen Jones, a member of the Bar of the Supreme Court of the United States and counsel of record for Jack O. Pearson, Appellant herein, hereby certify that on the ____ day of _____, 1977, pursuant to Rule 33, Rules of the Supreme Court, I served three copies of the foregoing Appellant's Reply Memorandum to Motion to Dismiss or Affirm on each of the parties herein, as follows:

On the State of Oklahoma, Respondent herein, by depositing such copies in the United States Post Office, in Oklahoma City, Oklahoma, with first class postage prepaid, properly addressed to the post office address of Larry Derryberry, Attorney General of the State of Oklahoma, the above-named Respondent's counsel of record, at the State Capitol in Oklahoma City, Oklahoma.

All parties required to be served have been served.
DATED this ____ day of _____, 1977.

Stephen Jones
Post Office Box 3339
Enid, Oklahoma 73701
Attorney for Appellant